No. 17060

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN RUSSELL KEEBLE, dba A. R. KEEBLE GLASS CO.,
Appellant,

vs.

IRVING SULMEYER, Trustee in Bankruptcy,
Appellee.

BRIEF OF APPELLEE.

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Jurisdiction.

The Court has jurisdiction of this appeal under Section 24a of the Bankruptcy Act, 11 U. S. C. Sec. 47a.

Statement of the Case.

Appellant filed voluntary bankruptcy and, by order dated August 20, 1959, was granted his discharge. On January 7, 1960, Appellee, the Trustee in Bankruptcy, petitioned to revoke the discharge on the ground that it had been procured through fraud. Hearing on this petition was held before Honorable Ray H. Kinnison, Referee in Bankruptcy, on February 25, 1960, resulting in an order of revocation entered March 11, 1960.

Appellant filed a timely petition to review the Referee's order of March 11, 1960. On June 16, 1960, the reviewing District Judge, Honorable Harry C. Westover, affirmed the Referee in Bankruptcy.

Notice of Appeal was filed by Appellant on July 15, 1960.

Statement of Facts.

Appellee, the Trustee in Bankruptcy, conducted an examination of Appellant at the first meeting of creditors on July 8, 1959. At this time, Appellant testified that he owned a lot in Big Bear, California; that it was encumbered by first and second trust deeds; and that the second encumbrance was a $2000 deed of trust which had been given to Appellant's brother in May, 1957, approximately two years before bankruptcy. [Tr., 7/8/59, pp. 6-7.] Questioned in more detail concerning the transaction under Section 21a of the Bankruptcy Act, Appellant, on December 1, 1959, repeated his testimony that the second deed of trust, and the note for which it was security, were prepared in May, 1957, two years before bankruptcy; and that the note was actually signed at that time, although the trust deed was signed in 1959. [Tr., 12/1/59, pp. 23-27.]

On February 25, 1960, it was proved at the trial on the revocation of discharge that this testimony was untrue. The particular bank forms upon which the note and second trust deed were prepared were printed for the first time in August, 1958, so that it would have been impossible for the documents in question to have been drawn up in May, 1957 as Appellant had testified. [Tr., 2/25/60, pp. 3-4.] Faced with this situation, Appellant admitted at the trial that he had actually prepared the documents shortly before bankruptcy in May, 1959, instead of two years previously [Tr., 2/25/60, pp. 18-19.] His explanation, which the Referee deemed either unacceptable or incredible, was that another note and trust deed had been made out in 1957, had been misplaced, and that the documents prepared on the eve of bankruptcy were intended as substitutes for the lost instruments. [Tr., 2/25/60, pp.

18-19.] The true fact concerning the date of preparation of the documents in question was not revealed by Appellant to his attorneys until after the false testimony had been given; had he been told the truth in time, Appellant's counsel would have prepared the bankruptcy Schedules and Statement of Affairs to reflect correctly the trust deed transaction, and the Trustee in Bankruptcy would not have been furnished misleading information. [Tr., 2/25/60, pp. 12-16.]

Question Presented.

Does the evidence support the holding below that Appellant made false oaths in his bankruptcy proceeding?

Statutes Involved.

Bankruptcy Act, Sec. 15, 11 U. S. C. Sec. 33:

> "The court may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it if it shall be made to appear that it was obtained through the fraud of the bankrupt, that the knowledge of the fraud has come to the petitioners since the granting of the discharge and that the actual facts did not warrant the discharge."

Bankruptcy Act, Sec. 14c(1), 11 U. S. C., Sec. 32c(1):

> "The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under title 18, United States Code, section 152;"

18 U. S. C. Sec. 152:

> ". . . Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; . . . Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

ARGUMENT.

Appellant Testified Falsely and Fraudulently With Respect to a Material Matter in His Bankruptcy Proceeding.

Appellant overlooks the basic proposition that findings of fact made by a Referee in Bankruptcy must be accepted on appeal unless "clearly erroneous." This rule is particularly applicable where, as here, the District Court has adopted and affirmed the Referee's findings.

> General Order in Bankruptcy No. 47;
>
> *Rogers v. Gardner,* 226 F. 2d 864, 866-867 (C. A. 9, 1955).

There is no question but that Appellant lied under oath with respect to the trust deed transaction. This being so, the observation of the Court of Appeals for the Second Circuit in *In re Slocum,* 22 F. 2d 282, 285 (1927), becomes pertinent:

> "Those who purposely answer untruthfully concerning material matters propounded upon their examination deserve no favor."

A. Appellant's False Testimony Was Fraudulent.

The Referee found in effect that Appellant intentionally made false representations and gave untrue testimony concerning the date on which the note and trust deed were prepared. [Finding of Fact No. 5.] Certainly he was correct in inferring from the evidence that the false testimony was not the result of inadvertence. It is inconceivable that Appellant could have forgotten about the preparation of the documents, since this occurred just before bankruptcy and was

thus fresh in mind. Indeed, Appellant does not now contend that his answers under oath were merely the result of innocent error. Rather, he seems to urge that since he expected to lose the Big Bear property in any event, and since he had been advised that the second trust deed was not valid as against the Trustee in Bankruptcy, it cannot be found that the false testimony was given "fraudulently" or with "intent to defraud."

With respect to this argument, it should be noted in the first place that the Referee, as the finder of fact, did not have to accept the testimony that Appellant expected the second trust deed to be invalidated in bankruptcy. Secondly, even if this was Appellant's expectation, the strongest inference is that the false testimony was given in the hope Appellee would be misled into not examining the transaction in detail. Particularly is this so in light of the fact that the trust deed holder was Appellant's brother, there being a strong motive on Appellant's part to protect his relative's financial interests by diverting the trustee from careful investigation of the encumbrance. If the trust deed went unchallenged in bankruptcy, the brother as a secured creditor would, of course, fare considerably better than he would as a general creditor. And an encumbrance believed to have been executed two years before bankruptcy would ordinarily receive less scrutiny than one which is suspicious on its face because made on the eve of the proceeding.

Thus, there is ample support for the Referee's conclusion that the untrue testimony was a false oath, *i.e.,* that it was fraudulent. As the Court of Appeals for the Eighth Circuit said concerning the "fraudulent

intent" element in *Aronofsky v. Bostian,* 133 F. 2d 290, 292 (1943):

> "It suffices that he knows what is true and so knowing wilfully and intentionally swears to what is false."

B. Appellant's False Testimony Related to a Material Matter.

Appellant further contends that the false testimony was not "material," but this argument cannot survive examination. A bankrupt's obligation under Section 7a(10) of the Bankruptcy Act, 11 U. S. C. Sec. 25a(10), is to "submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge. . . ." It is submitted that any information referred to in Section 7a(10), or called for by the Official Forms of Schedules and Statement of Affairs promulgated by the Supreme Court, is material for the purpose of a false oath. A question which may not seem material on its face might, if answered truthfully, lead to an inquiry which is clearly important to the bankruptcy administration. As Appellant's attorney testified, the same false statements upon which the discharge was revoked misled counsel so that Schedule A-2 and item 11 of the Statement of Affairs were incorrectly answered. [Tr. 21/25/60, pp. 13, 15.]

That the false testimony in issue was highly material becomes even clearer when certain substantive provisions of the Bankruptcy Act are considered. Thus,

the second trust deed, actually executed just before bankruptcy, was vulnerable to attack as a preference (Bankruptcy Act, Sec. 60, 11 U. S. C. Sec. 96), and perhaps as a fraudulent transfer. (Bankruptcy Act, Sec. 67d, 11 U. S. C. Sec. 107d). If Appellant by testifying falsely could have misled Appellee into believing that the trust deed was two years old, the encumbrance might not have been attacked, since only preferences made within four months of bankruptcy, and only fraudulent transfers made within one year, are vulnerable under the respective sections above referred to. Similarly, if the giving of the second trust deed amounted to a fraudulent transfer, this would constitute a ground for objection to Appellant's discharge, but only if the trust deed were given within the one year period preceding bankruptcy. (Bankruptcy Act, Sec. 14c(4), 11 U. S. C., Sec. 32c(4).) For these reasons, if for no other, any statements pertaining to the date of execution of the encumbrance were most material. Appellant's alleged intention not to defend the trust deed, even if concurred in by his brother, does not affect the legal materiality of the false testimony. It should be noted, moreover, that this so-called intention to abandon the trust deed was not revealed to Appellee nor to his counsel until after the false testimony had been given and Appellee was hot on the trail.

Whether false testimony is material does not depend upon whether the falsehood is detrimental to creditors.

In re Slocum, 22 F. 2d 282 (C. A. 2, 1927).

Appellant's present argument is similar to the one made in *In re Parsons,* 88 F. 2d 428 (C. A. 2, 1937). There, a bankrupt falsely denied under oath that he

had transferred certain property to his wife. His discharge was challenged on this ground. In defense, he proved that the property, as a matter of law, belonged to the wife before the transfer, and argued that, accordingly, the conveyance he had lied about lacked any legal effect. Nevertheless, the Court ruled that the discharge should not be granted because of a false oath:

> "When he was asked whether he had made a transfer, he should have disclosed the instrument of November 4, 1933, so that the trustee could properly investigate the bankrupt's affairs, and the question, we think, called for a disclosure of an instrument in which he quitclaimed his interest in the estate in remainder even though his interest as a matter of law had theretofore passed to his wife." (88 F. 2d at 429-430.)

Conclusion.

For the foregoing reasons, the Order of the District Court entered June 16, 1960 should be affirmed.

Respectfully submitted,

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